IN THE MATTER OF PREMIER LOUNGE - LEGAL OWNER AND PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 180 WINTERS LANE 1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO: 18-149-SPHA

* * * * * * * * * * * * *

OPINION

This matter comes before the Board of Appeals for Baltimore County (the "Board") as an Appeal from Administrative Law Judge's March 19, 2018 decision which dismissed without prejudice a Petition for Special Hearing and denied a Petition for Variance filed by Premier Lounge, LLC, the legal owner of the property located at 180 Winters Lane in Catonsville, Maryland. The Board of Appeals conducted a *de novo* hearing on September 27, 2018 and January 17, 2019, and deliberated this matter on April 2, 2019. Petitioner was represented by Abraham L. Hurdle, Esquire. Carole S. Demilio, Deputy People's Counsel for Baltimore County, participated on behalf of People's Counsel. Protestants from the neighborhood surrounding the property were present throughout the hearing.

The Petition for Special Hearing was requested pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to allow commercial parking in a residential zone. The Petition for Variance requested as follows:

(1) to allow business parking in a residential zone;
(2) to allow 7 parking spaces in lieu of the required 91 spaces;
(3) to allow parking at a distance to a street line of 5 ft. in lieu of the required 10 ft.;
(4) to not provide a backup area for the end parking space;
(5) to allow a 3 ft. wide landscape strip adjacent to the residential property in lieu of the required 10 ft. and to allow a 6 ft. high wood screen fence in lieu of planting;
(6) to allow 3 ft. between the edge of the parking lot and the face of the building in lieu of the required 6 ft.;

(7) to allow a 5 ft. setback from a dumpster enclosure to a residential property line and an 8 ft. setback to a R/W line in lieu of the required 10 ft.; and
(8) to allow a 3 ft. RTA buffer and a 3 ft. setback in lieu of the required 50 ft. RTA buffer and 75 ft. setback.

BACKGROUND

The subject property, located at 180 Winters Lane in Catonsville, Maryland, is split zoned Business local (B.L.) and Density Residential 5.5 (D.R. 5.5). The rear of the property is residential. The property was previously operated as a bar/restaurant/package goods establishment known as The Brick House, which was owned by Roosevelt Fletcher and managed by Kevin Keene. After Roosevelt Fletcher's death in March of 2016, the property went through his estate and was ultimately sold at an auction to Tiffany and Steven Patterson ("the Pattersons") on April 12, 2017. After purchase, the Pattersons spent substantial sums of money to renovate the subject property. The property currently operates as a restaurant, tavern, package goods and private event venue. In order to maintain the property's liquor license, the Pattersons were advised they had to comply with Baltimore County's Zoning Regulations.

This matter came before the Administrative Law Judge (ALJ) as a result of applications for a Special Hearing and Variances from the Baltimore County Zoning Regulations. The ALJ held a hearing, took testimony and received comments from community residents concerning this matter. The ALJ dismissed the Petition for Special Hearing to allow business parking in a residential area. The Petition for Variances was likewise denied.

The Petitioner(s) appealed the ALJ decision to the Baltimore County Board of Appeals ("Board").

THE HEARING

The Board conducted a *de novo* hearing. Testimony was received from

Petitioner/Appellant's expert Thomas J. Hoff, Registered Landscape Architect, who was accepted as such by the Board. Testimony was also received from Frank Lidinsky, Esquire (Court-appointed Successor Personal Representative for the Estate of Roosevelt Fletcher), Kevin Keene (former manager of The Brick House), LaKeisha McClendon (Community Engagement Liaison for Petitioner), Mr. Henderson (Regular Patron of The Brick House and Premier Lounge) and the Pattersons. Several community residents also provided testimony to the Board.

Mr. Hoff testified regarding the site plan, that the property was unique, and provided opinions as to the requirements for parking, setbacks and other issues affecting the property. Mr. Lidinsky discussed estate issues that affected the use of the property prior to sale. Mr. Keene testified about his efforts to maintain and continue use of the property after the death of Mr. Fletcher. Ms. McClendon advised the Board of her efforts, on behalf of Petitioner, to learn of, and address community concerns regarding the property. Mr. Henderson testified as a regular patron who enjoys the property currently. The Pattersons testified as owners and managers of Premier Lounge, LLC, regarding their purchase, property improvements, use, hardships, and efforts to meet community concerns regarding their use and patrons visiting the property. Community residents testified in opposition to the petitions.

DISCUSSION

The threshold issue in this matter is whether the Petitioner/Appellant has met the test for entitlement to a variance as established in the Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995).

In order to grant a variance, Baltimore County Zoning Regulations (BCZR) § 307.1 states, as relevant:

> "...The County Board of Appeals...shall have and they are hereby given the power to grant variances from height and area regulations, from off-street parking

> regulations, and from sign regulations only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning regulations for Baltimore County would result in practical difficulty or unreasonable hardship…Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare…"

In short, in order to obtain a variance in this instance, Petitioner first must prove the uniqueness of the property and then that such uniqueness results in practical difficulty. *See* Cromwell v. Ward, *supra* 102 Md. App. at 703-722; 651 A.2d at 430-440. The uniqueness element requires that the subject property have an inherent characteristic not shared by other properties in the area, such as, shape, topography, sub-surface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. Id., 102 Md. App. at 710-11; 651 A.2d at 433-34, citing North v. St. Mary's County, 99 Md. App. 502, 514-15; 638 A. 2d 1175 (1994). On the other hand, the uniqueness cannot be caused by improvements upon the property or a neighboring property. Id. 102 Md. App. at 710; 651 A.2d at 433-34.

With respect to practical difficulty, there is a three-part inquiry: (1) whether compliance with the strict letter of the restrictions governing area, setbacks, etc., would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether a grant of the variance would do substantial justice for the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel, 407 Md. 53, 83-

84; 962 A.2d 404, 422 (2008), citing McLean v. Soley, 270 Md. 208, 214-15; 310 A.2d 783, 787 (1973). The hardship at issue cannot be self-created. Cromwell, 102 Md. App. at 721-22; 651 A.2d at 439-40. In addition, financial considerations also do not necessarily justify a petitioner's entitlement to variance relief. *See* Green v. Bair, 77 Md. App. 144, 151; 549 A.2d 762, 765 (1988) ("Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance," *citing*, Daihl v. County Board of Appeals, 258 Md. 157, 167; 265 A.2d 227, 232 (1970) (other citations omitted)). At the same time, financial hardship can be a consideration. Id.

Considering the tests for meeting the variance requirements and after reviewing all of the testimony and evidence presented, the Board has determined the Petitioner has met its burden, the property is unique and the Petitioner will suffer practical difficulty and unreasonable hardship if the variance is not granted.

As to uniqueness, the Board finds, based on the evidence, that this property has inherent characteristics which differ from other properties in the neighborhood. The property is five (5)-sided with a somewhat triangular shape, differing from other neighboring properties. It was also persuasive that the property is split zoned (B.L. in front and D.R. 5.5 in rear) and endured a loss of two (2) street-side parking spaces in front by reason of the actions of Baltimore County. Ultimately, the Board found the shape of the property meets the uniqueness standard.

As to practical difficulty, the Board finds the Petitioners would suffer a practical difficulty in not being able to meet the zoning regulations as well as a tremendous loss due to monies spent to improve the property. Even neighbors who opposed the application, admitted the appearance of the property has improved over the prior business (The Brick House) and the period of time when it was vacant after the death of Mr. Fletcher. When the Pattersons purchased the property at

auction, it indicated there were ten (10) on-site parking spaces. The Pattersons testified that Mr. Lidinsky had assured them that there was no zoning impediment to the continued use of the facility as a tavern and package goods store. They had every right to rely on the representations of the attorney handling the estate. The Board finds the practical difficulty was not self-imposed and not caused by the proposed use. It should be noted the Petitioner's use of the property and parking is similar to the prior business, The Brick House, with significant upgrades to improve the property and the overall operation. Further, there is virtually no practical use for this property under the BCZR without a parking variance.

The Petition for Special Hearing would allow business parking in a residential zone. Testimony on behalf of the Petitioner was they would hold a maximum of approximately forty (40) guests in the facility at any one time. Petitioner testified they have verbal, but not written, agreements with other locations for off-site parking: a now vacant church, which has moved to another location, and a neighboring business across from the property. Though unwritten, these parking alternatives are real, and it would be unfair to simply ignore practical and realistic accommodations. Testimony from neighbors established the neighborhood is mostly residential, and parking of vehicles on residential streets causes noise and congestion at times. The Board is cognizant of the parking pressure in all relatively densely populated residential neighborhoods, especially those that were built before two, and now sometimes, three car families were the norm. The Board does credit the Petitioners' testimony that they have informal agreements with two neighboring establishments that would permit parking at those sites. Additionally, the Board finds the impact to the neighbors to be minor as traffic associated with the property is intermittent and will not unduly burden the community due to parking spaces on the property and the limited maximum capacity (40) cited by Petitioner. The Board grants the Petition for Special Hearing.

The Board finds the request complies with the spirit and intent of the regulations. Testimony of some neighbors was that the current ownership has cleaned-up the property and is better than the prior ownership. The Board noted there was testimony that the community has embraced other events in the neighborhood, but not the Petitioner's. Based on capacity, use, and the limited patrons, the majority found that the petition is in harmony with the spirit and intent of the regulations.

The non-conforming use issue raised by the Petitioner at the hearing and discussed in its closing memorandum was not persuasive. BCZR § 500.7 requires public notice and public hearing for a non-conforming use. A petition requesting the continuance of a non-conforming use was not filed, no notice posted, and there was no hearing on the issue. The Board finds that a ruling on non-conforming use is not before the Board.

DECISION

A review of the evidence leads to the conclusion that Petitioner has proven the uniqueness of the subject property. Petitioner submitted evidence to illustrate that some characteristic is peculiar to the subject property when compared to other area properties. Petitioner, introduced evidence that the property has an irregular somewhat triangular shape with five (5) sides on the property. Petitioner's property differs from other area properties. The Petitioner will suffer practical difficulty and undue hardship, if the petition is not granted.

The special hearing request to allow commercial parking in a residential zone must also be addressed. The residents, who live near the property, appeared and testified in opposition to the Petition. The main issue raised by all the residents was parking on their streets, thereby depriving residents of sufficient parking. At least one resident expressed a concern that the patrons' consumption of alcohol may be disruptive to their neighborhood. However, the effects do not

appear any worse (and are likely better) than those encountered when the property was operated as The Brick House. Premier Lounge, by many accounts, has had a positive impact on the area and is enjoyed by nearby residents, even as admitted by those that opposed Petitioner's variance requests.

ORDER

THEREFORE, IT IS THIS 22nd day of November, 2019, by the Board of Appeals of Baltimore County,

ORDERED that Petitioner/Appellant's request for Special Hearing from Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to allow for commercial parking in a residential zone designated DR 5.5. be and is hereby GRANTED; and

IT IS FURTHER ORDERED that Petitioner/Appellant's Variance requests for 180 Winters Lane as follows:

(1) Section 409.8.B- Special Hearing to allow business parking in a residential zone is GRANTED;
(2) Section 409.6.A.2- Variance to allow 7 parking spaces in lieu of the required 91 spaces is hereby GRANTED;
(3) Section 409.8.A.4- Variance to allow parking at a distance to a street line of 5 ft. in lieu of the required 10 ft. is hereby GRANTED ;
(4) Section 409.8.A.5- Variance to not provide a backup area for the end parking space is hereby GRANTED;
(5) Section 409.8.A.1- Variance to allow a 3 ft. wide landscape strip adjacent to the residential property in lieu of the required 10 ft. and to allow a 6 ft. high wood screen fence in lieu of planting is hereby GRANTED;
(6) Section 409.8.A.1- Variance to allow 3 ft. between the edge of the parking lot and the face of the building in lieu of the required 6 ft. is hereby GRANTED;
(7) Section 409.8.A.1- Variance to allow a 5 ft. setback from a dumpster enclosure to a residential property line and an 8 ft. setback to an R/W line in lieu of the required 10 ft. is hereby DENIED. If the Petitioners have to use one of the on-site parking spaces for a dumpster, they will have to create another on-site parking space in order to maintain a minimum of 7 spaces; and
(8) Section 1B01.1.B.1.e(5)- Variance to allow a 3 ft. RTA buffer and a 3 ft. setback in lieu of the required 50 ft. RTA buffer and 75 ft. setback is hereby GRANTED.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Kendra Randall Jolivet

Joseph L. Evans

IN THE MATTER OF PREMIER LOUNGE - LEGAL OWNER AND PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 180 WINTERS LANE 1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO: 18-149-SPHA

* * * * * * * * * * * * *

DISSENTING OPINION, WITH CONCURRING (IN PART) OPINION

Concurring, In Part

The undersigned concurs with the majority opinion on two points: (1) the status as a nonconforming use is not properly in front of the Board; and (2) the denial of the variance requested regarding the dumpster. The undersigned will address only the nonconforming use in the Concurring Opinion. Because the undersigned concluded Petitioner is not entitled to any relief, the undersigned, *a fortiori*, joins the majority in its denial as to the one variance. As such, the undersigned addresses additional grounds in support of the undersigned's reasoning in disposing of the nonconforming use issue.

Nonconforming Use

Petitioner presented some testimony and then argued that the subject property has been used as a restaurant/bar and package goods store since its inception. Petitioner asserts that, under current regulations, the use of the subject property is nonconforming. Petitioner argued that following the passing of Mr. Fletcher, there was no abandonment of the subject property's nonconforming use.

Under BCZR §500.7, any interested person may petition for a public hearing after advertisement notice to determine the existence of any purported nonconforming use on any

premises. Petitioner's Petition, however, fails to identify the status of the nonconforming use as subject matter for the hearing.

Because the Board of Appeals has appellate jurisdiction and not original jurisdiction, the issue cannot be presented anew to the Board of Appeals, even when subject to a de novo hearing. Halle Companies v. Crofton Civic Ass'n, 339 Md. 131, 143; 661 A.2d 682, 687-88 (1995); see also, Hardy v. State, 279 Md. 489, 492; 369 A.2d 1043, 1046 (1977). The determination of whether the exercise of jurisdiction is appellate or original does not depend on whether the Board has authorization to receive additional evidence. Halle, 339 Md. at 143; 661 A.2d 688. Rather, as Chief Justice John Marshall explained long ago (and echoed by the Court of Appeals in Halle), "'it is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause…'" Id., quoting, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175; 2 L. Ed. 60, 73 (1803).

As such, the Administrative Law Judge has original jurisdiction on this issue and the absence in the Petition and record below established that the status of nonconforming use issue was not presented at a public hearing in a court with original jurisdiction. Moreover, BCZR §500.7 requires a public hearing following public notice on the status of a nonconforming use. As evidenced by the public notice itself, but also the Petition, Petitioner failed to provide the required public notice for this issue. For all of these reasons, the status of nonconforming use is not properly in front of the Board and is not an issue for the Board to decide in the appeal at hand. Therefore, the undersigned concurs with the majority and joins in the result on the nonconforming use issue.

Dissenting Opinion

This dissent concerns the majority's rulings granting the Petition for Special Hearing to allow business parking in a residential zone and its findings regarding the variance requests,

particularly: (1) the uniqueness of the subject property; (2) the self-imposed practical difficulty; (3) the disharmony with the spirit and intent of the zoning regulations; (4) the imposition of relief causing injury to the health, safety and general welfare; and (5) the individual variances sought (with the exception of the one variance for which the Board agrees unanimously). While the undersigned may have sympathy for Petitioner who has invested time and significant money into renovating and operating Premier Lounge, the law applied to these facts dictates one outcome --- a denial of the Petition on all relief.

A. Petition for Special Hearing for Business Parking in a Residential Zone

Pursuant to BCZR §500.7, Petitioner requested a determination that it may use land in a residential zone for parking facilities to meet the parking requirements set by BCZR §409.6. As set forth in BCZR §409.8(e), the tribunal may grant or deny the request conditioned upon: (1) its findings on the request following a public hearing; (2) the character of the surrounding community and anticipated impact of the proposed use on that community; (3) the manner in which the requirements of §409.8.B.2 and other applicable requirements are met; and (4) any additional requirements as deemed necessary in order to ensure that the parking facility will not be detrimental to the health, safety or general welfare of the surrounding community and as are deemed necessary to satisfy the objectives of BCZR §502.1 (Special Exception Factors).

Recognizing that the subject property is split zoned between Business Local (BL) and Density Residential 5.5 (DR 5.5), the undersigned finds that the proposed use is too intense for the subject property. Petitioner proposes to use the subject property as a restaurant, bar, package goods store and private party venue/catering hall. The property, as proposed, would provide only seven parking spaces, though by Petitioner's expert's calculations, at least 91 spaces are required by the Regulations, a deviation of approximately 93%.

Petitioner does not have any written agreement with nearby properties to use nearby parking lots or spaces for its manifest need for parking spaces. Notably, in the Opinion and Order from below, the ALJ specifically referenced Petitioner's testimony regarding verbal agreements with two nearby properties. The ALJ identified the County's requirement of a guarantee of future availability and proper maintenance, whether by way of easement, deed restriction, restrictive covenant or binding contract, and rejected Petitioner's evidence of these verbal agreements, citing BCZR §409.7.C. In front of the Board, Petitioner echoed the same testimony regarding verbal arrangements, but added one of the properties subject to one of those verbal agreements for overflow parking was recently sold, establishing even less certainty than when first identified.

Given the testimony of the personal commitment and financial expenditures and the specific mention on this point, Petitioner should have prioritized its efforts to secure such a written agreement prior to the hearing in front of the Board. However, though so cautioned in the decision below, Petitioner did not obtain, and therefore did not present, any written guarantee to the Board regarding the continued availability (or *any* availability) of nearby lots for overflow parking.

In any event, the Board should not and cannot rely on the testimony regarding the verbal agreements as being satisfactory or mitigating the impact to be caused. For one, the testimony was vague. At best the alleged verbal agreements, if credited, can only be considered temporary, contingent, and without meaningful commitment. The alleged agreements can be summarily rescinded with no backup plan for the overflow parking. As such, the Board cannot rely on that testimony as sufficient evidence for the Board to conclude that the accompanying detrimental impact is mitigated by these verbal agreements.

As such, the evidentiary record dictates one conclusion --- overflow parking will occur elsewhere, namely, the surrounding residential streets. For nights or events with any sizable

attendance, patrons driving to the subject property will result in increased use of parking in the surrounding residential area.

Neighbors Sherlyon Braithwaite, Sean Lawson, Margo Lawson, Lynne LeVere, and Carroll LeVere all provided testimony as to the largely residential character of the surrounding area, the narrow nature of the streets (with the testimony for both aspects supported by photographs and the aerial map), and parking issues already experienced and attributed to the operation of Premier Lounge, though not presently operating in full capacity. Their testimony, individually and collectively, was credible and convincing. The evidence more than supports the conclusion that the impact from overflow parking, once Premier Lounge is fully operational, will undoubtedly exacerbate the problems presently experienced. Moreover, the neighbors also identified noise issues coming from the operations on site and patrons coming and going. The noise and related issues are not just experienced in the residential parking areas, but also emanating from activity in the property's parking lot.

The Special Hearing Petition also requires an analysis of the manner in which the requirements of §409.8.B.2 and other applicable requirements are met. First, in addition to the relief sought pursuant to §500.7, Petitioner requires seven variances, several of which concern the onsite parking. Section 409.8.B.2 states that the subject parking facilities shall be subject to certain conditions, including, but not limited to, as is relevant by the testimony: (b) only passenger vehicles may use the parking facility; (d) lighting shall be regulated as to location, direction, hours of illumination, glare and intensity, as required; (e) a satisfactory plan showing the parking arrangement and vehicular access; and (f) method and area of operation, provision for maintenance and permitted hours of use shall be specified and regulated as required.

Various photographs depict construction vehicles and snow removal vehicles using the parking lot. It is understood that following the intervention of the area County Councilperson that issue had been resolved by the time of the hearing in front of the Board. Presumably, the issue will not arise again. However, Petitioner is only restricted by the spirit of cooperation or the waxing and waning of neighbors' dedication and patience in contacting Code Enforcement in the absence of that cooperation.

No lighting plan or concept plan was provided by Petitioner and therefore, its impact upon the neighbors cannot be assessed at this time. The request for a variance of the required back up area for the end parking space appears to create a conflict between the plan's parking arrangement and vehicular access, particularly, if a vehicle on the end is to back out of the parking space, that vehicle can only back out into the entrance/exit to the parking lot. It reasonable to think that the conflict increases the risk of an accident and can lead to congestion on Shipley Avenue.

Finally, in light of the liquor license, the subject property may remain open until 2:00 a.m.[1] Whether at 2:00 a.m. or even somewhat before, the neighbors immediately adjacent or otherwise within earshot of the subject property will have to deal with the consequences. Mr. Braithwaite testified, since the Premier Lounge started operations, he called the police several times already for people playing music from their car radios too loud, hanging around outside, and smoking marijuana between the hours of 10:00 p.m. and 2:00 a.m. Mr. Lawson and his mother testified about similar activities and issues.

Therefore, the undersigned finds that the requirements of BCZR §409.8.B.2 and other applicable requirements have not been met. For the same reasons, the requested relief is likely to be detrimental to the health, safety and general welfare of the surrounding neighbors. The need to

[1] As per the testimony of Petitioner Stephen Patterson.

use the surrounding residential area for parking likely will lead to congestion in the surrounding roads, streets and alleys as well. The evidence reveals the relief sought is inconsistent with the spirit and intent of the zoning regulations. As such, the undersigned cannot find that the objectives of §502.1 have been satisfied.[2] Moreover, no conditions have been imposed that will mitigate these issues. In light of the above, the undersigned would deny this relief.

B. Requested Variances

The undersigned does not take issue with majority opinion's recitation of the applicable variance standards. In fact, the undersigned believes the citations to most of the cases relied upon support the dissent (e.g. Trinity, Cromwell, Green, Daihl).

In Maryland, the well-established general rule is "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." Trinity Assembly of God of Baltimore City v. People's Counsel, 407 Md. 53, 79; 962 A.2d 404, 419 (2008), citing Cromwell v. Ward, 102 Md. App. 691, 703; 651 A.2d 424, 430 (1995). In Baltimore County, variances from height and area regulations may be granted "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty[3] or unreasonable hardship." BCZR §307.1. Furthermore, "any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare." Id.

[2] The majority opinion does not address the §502.1 factors.

[3] Because the changes to the character of the neighborhood are considered less drastic with area variances than with use variances, the less stringent "practical difficulties" standard applies to area variances, while the "undue hardship" standard applies to use variances. Montgomery County v. Rotwein, 169 Md. App. 716; 906 A.2d 959 (2006).

The "special circumstances or conditions [that] exist that are peculiar to the land or structure," commonly referred to as a subject property's "uniqueness," do not include within its scope the extent of improvements upon the property. North v. St. Mary's County, 99 Md. App. 502, 514; 638 A.2d 1175, 1181 (1994). Rather, the property's uniqueness, for zoning purposes, "requires that the subject property have an inherent characteristic not shared by other properties in the area," such as the property's "shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions." Id.

The undersigned finds that this property's "uniqueness" is caused only by the owner's desire to operate it in a manner wholly inconsistent with its size and location. In other words, the property objectively lacks the required uniqueness caused by its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, or restrictions imposed by abutting properties. The only argument tendered by the majority as to those physical features concerns its shape.

The property is shaped like a five-sided irregular polygon or non-symmetrical pentagon. Notably, the nearby Lawson property (one neighbor over from the subject property on Shipley Avenue) is also a five-sided irregular polygon. Other nearby properties are four-sided irregular polygons. The subject property's five-sided shape does not cause any practical difficulty distinct from the other referenced properties should those properties be used in the manner proposed by Petitioner. Due to similar size limitations, the nearby four-sided properties and other five-sided property cannot maintain the required setbacks, screening and landscaping, or parking for which variances are sought. As noted by the Court of Appeals, "[w]here a property's physical peculiarities do not cause the landowner to suffer disproportionately due to application of the

zoning enactment in question, the property is not "unique" in the law of variances." Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, 407 Md. 53, 82; 962 A.2d 404, 421 (2008).

Nothing about the property shape inhibits Petitioner from using the subject property in a reasonable manner consistent with its surroundings and zone, or even in a manner requiring some minor variances, as opposed to the multiple and substantial deviations from the zoning regulations associated with Petitioner's *desired* uses. In fact, the real issue caused by the shape of the site is that, simply, it is not large enough to accommodate Petitioner's *desired* uses. In this context, the shape of the property cannot direct or support a finding of uniqueness in this context under the standards set forth by Cromwell v. Ward and its progeny.

With respect to the loss of the two street-side parking spaces, first, those spaces are not on or part of the subject property. Therefore, the property does not become unique because of the loss of two publicly available offsite parking spaces. Moreover, it needs to be noted, that while the proximity of those spaces resulted in their use by customers of the property in its former iterations, there was no evidence that those spaces were dedicated to the sole use by customers of the property.

Even if Petitioner is credited with the loss of the two spaces, Petitioner would still need a parking variance that resulted in a 90% deviation, instead of 93%, from the required parking spaces to operate as it wants. In addition, the loss of those two adjacent parking spaces fails to speak to the requested setbacks, landscaping, buffers, and other variances and therefore, cannot justify those variances. Under Maryland law, "[The owner] must prove ... a connection between the property's inherent characteristics and the manner in which the zoning law hurts the landowner." Dan's Mt. Wind Force, LLC v. Allegany Cty. Bd. of Zoning Appeals, 236 Md. App. 483, 496; 182 A.3d 252, 259 (2018), quoting Trinity Assembly of God of Balt. City, 407 Md. at 82. In other words, the

unique aspect of the property must have a nexus with the aspect of the zoning law from which a variance is sought. Id. For all of these reasons, the loss of the two public parking spaces are of no consequence to the Board's evaluation in connection with any of the relief sought, but certainly not as part of the consideration of the property's uniqueness.

The majority also identifies the fact that the property is split zoned between BL and DR 5.5. Because the zoning classifications are not part of the physical characteristics, the split zone nature does not merit consideration while analyzing the property's uniqueness. See, e.g., Trinity, 407 Md. at 82. Even still, it needs to be noted that the nearby Morningstar Baptist Church property is also split zoned between BL and DR 5.5 and so, on that basis it is not unique in any event.

Leaving aside whether the split zone should be considered, similar to the loss of two public parking spaces, the split-zone issue needs to tether the property's physical characteristics to the harm caused to the landowner. Id. The property's split-zone aspect does not speak to the alleged needs for the variances related to the number of parking spaces, RTA buffer and setback, the aisle space, etc. Once again, the "harm" arises not from the property's zoning classifications, but rather, Petitioner's *desired* uses.

For example, the RTA buffer and setback requirements are generated from the property's location within a DR zone (BCZR §1B01.B.1.e(5)), not its location within the BL zone. In addition, the variances requested (and now granted) result in an 83% buffer reduction and nearly a 100% setback reduction.

By way of further example, the parking requirements are generated by the proposed uses. Its location in the BL Zone requires the property to comply with the parking regulations in BCZR §409. The need to use the residential section of the property for business parking enables the

Petitioner to apply for the same under BCZR §409.8.B in order to meet the parking requirements of §409.6.

Therefore, the County regulations provide an avenue of relief for confined businesses, such as Petitioner's. Petitioner can (and did) apply to use the residential zoned part of its property to comply with business parking regulations. Unfortunately, the residential-zoned part of its property cannot help Petitioner come into compliance. In fact, even with full use of the residential-zoned part for parking as proposed, Petitioner can only ever achieve 7% compliance with the parking regulations, rendering the concept of "compliance" and the phrase "meet the requirements" devoid of meaning. As such, the split-zone nature of the property has not caused the need for the radical variance relief sought. See also, Trinity, *supra.*

Finally, Petitioner, assuming a finding of uniqueness, must establish practical difficulty to warrant variance relief. Petitioner must prove:

> 1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome;
>
> 2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and
>
> 3. Whether relief can be granted in such a fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Trinity, 407 Md. at 83-84; 962 A.2d at 422.

Under Maryland law, "self-created hardship is created by the property owner not by the property itself." Richard Roeser Prof. Builder, Inc. v. Anne Arundel County, 368 Md. 294, 298; 793 A.2d 545 (2002). As implied above, Petitioner has not proved practical difficulty. More accurately, the undersigned is more than satisfied that the practical difficulty alleged is actually

self-imposed. Petitioner's uses are too intense for a site this size. Petitioner's desired uses exacerbate the need for multiple and substantial variances and other zoning relief.

In addition to the desired uses requiring the need for substantial disregard of the applicable zoning regulations, the testimony reveals either the lack of due diligence in inspecting and investigating the property prior to purchase or actual or constructive knowledge of certain issues that prompt these requests. Either way, the difficulties Petitioner complains of were and/or are of Petitioner's own doing. Petitioner could use the property in other ways that would mitigate the need for such radical departures from the zoning regulations. "Ordinarily, a variance is warranted if the 'applicable zoning restriction . . . is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership,' or otherwise results in 'unwarranted hardship.'" Mueller v. People's Counsel for Balt. County, 177 Md. App. 43, 70; 934 A.2d 974, 989-990 (2007), quoting, Belvoir Farms Homeowners Ass'n, Inc. v. North, 355 Md. 259, 276, 282; 734 A.2d 227 (1999)). Nothing presented in this case causes the undersigned to conclude that application of the regulations constitutes an arbitrary and capricious interference with the basic right of private ownership or unwarranted hardship.

The record conclusively establishes for the undersigned that to achieve substantial justice, the Board is required to deny this Petition. Moreover, the uses require variances so substantial that granting them eviscerates the spirit and intent of the regulations, in polar opposition to the "strict harmony" required by BCZR §307.1. The majority concludes that the requests complies with the spirit and intent because the current ownership "has cleaned up the property and is better than the prior ownership," neither of which speaks to the spirit and intent of the parking regulations, buffer and setback regulations, or other applicable regulations. To the contrary, these variances wholly

disregard the spirit and intent by the extreme magnitude of the individual departures from the regulations, also compounded by the combination.

The evidentiary record is clear --- the variance requests fail on the merits as Petitioner has not proved the uniqueness of the property and the difficulties are self-imposed. The magnitude of the deviations required by the variance requests also subject the applicable regulations to an existential crisis, precluding any finding of being anywhere near the spirit and intent of the regulations.

The undersigned finds that the variance requests are tantamount to rezoning the property or rewriting the applicable regulations, even rendering some optional. The Board does not have the authority to engage in either. Nevertheless, the granting of the variances stands in stark contravention of the applicable regulations and prevailing case law, prompting the undersigned to vigorously dissent.

November 22, 2019
Date

Jason S. Garber, Chair

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 22, 2019

Abraham L. Hurdle, Esquire
320 North Charles Street
Baltimore, MD 21201

Carole S. Demilio, Deputy
Office of People's Counsel
for Baltimore County
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

RE: In the Matter of: Premier Lounge, LLC
Case No.: 18-149-SPHA

Dear Counsel:

Enclosed please find a copy of the final Majority Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter. Also enclosed is a copy of Mr. Garber's Dissenting Opinion.

Any petition for judicial review from this decision must be made in accordance with Rules 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington

Krysundra Cannington
Administrator

KLC/
Enclosure

c: Tiffany and Stephen Patterson/Premier Lounge, LLC
Thomas J. Hoff
Carroll & Lynne LeVere
Margo & Kim Lawson
C. Pete Gutwald, Director/Department of Planning
James R. Benjamin, Jr., County Attorney/Office of Law
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Paul M. Mayhew, Managing Administrative Law Judge